

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Supreme Airport Shuttle LLC and Shuttle Drivers Association of BWI.** Case 05–RC–187864

February 7, 2017

**ORDER**

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS  
PEARCE AND MCFERRAN

The Employer’s Appeal from the November 18, 2016 Order of the Regional Director Denying Employer’s Motion to Require Petitioner’s Counsel to Withdraw is granted in part.

In brief, the Employer on November 17, 2016, filed a motion with the Regional Director, requesting that he issue an order pursuant to Section 102.177 of the Board’s Rules and Regulations requiring the Petitioner’s counsel to withdraw from his representation of the Petitioner. The motion was based on the contention that Petitioner’s counsel, because he had previously represented the Employer in another matter, suffered from a disqualifying conflict of interest in light of Rule 1.9 of the Maryland Lawyers’ Rules of Professional Conduct, as applicable here by virtue of Section 102.177(a) of the Board’s Rules and Regulations.<sup>1</sup> On November 18, 2016, the Regional Director denied the Employer’s motion, after determining that he lacked the authority under Section 102.177 to grant the relief sought. The Employer has appealed, urging the Board to direct the General Counsel to initiate an investigation of the Employer’s allegations, pursuant to Section 102.177.

After careful consideration, the Board has determined that the Regional Director, pursuant to the authority delegated by the Board to Regional Directors with respect to representation proceedings and subject to the Board’s review, has the authority to decide whether the relief sought by the Employer is warranted, independent of the disciplinary procedure established by Section 102.177, which is administered by the Board’s General Counsel.

The Board’s decisions make clear that, in an unfair labor practice proceeding, an administrative law judge, subject to the Board’s review, has the authority to disqualify a party’s counsel based on an impermissible con-

flict of interest. See *Mack Trucks*, 277 NLRB 711, 711 fn. 1, 719–723 (1985). See also National Labor Relations Board, Division of Judges, Bench Book Sec. 6-202 (Nov. 2016) (ALJ Wedekind, ed.). Although the issue here seems to present a question of first impression, there is no sound reason for taking a different approach in representation proceedings. The Board has an institutional interest in policing and preserving the integrity of its own proceedings, regardless of their nature.

That interest is also reflected in Section 102.177(b) of the Board’s Rules and Regulations, which provides that “[m]isconduct by any person at any hearing before an administrative law judge, hearing officer, or the Board shall be grounds for summary exclusion from the hearing.” The disciplinary procedure established by Section 102.177 contemplates an investigation by the investigating officer and a determination by the General Counsel whether to institute formal proceedings against the attorney.<sup>2</sup> However, the relief sought by the Employer here, disqualification of the Petitioner’s attorney, is not a form of discipline. It therefore makes no sense to follow that procedure—which might entail a hearing before an administrative law judge, followed by both Board and judicial review—particularly given the inevitable and undesirable delay that such a separate proceeding would mean for the processing of the representation petition here. See generally *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946) (observing that “the Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily”).

As explained, the Regional Director has the authority to rule on the Employer’s motion and, if warranted, to grant the relief requested, subject to the Board’s review. The Board accordingly reverses the Regional Director’s ruling and orders him to reconsider the Employer’s motion and conduct any investigation he deems necessary in order to decide the motion, including, but not limited to, the solicitation of affidavits or the opening of an ancillary hearing. The Regional Director may examine Rule 1.9 of the Maryland Attorneys’ Rules of Professional Conduct, as well as the essentially identical standard reflected in Rule 1.9 of the American Bar Association’s Model Rules of Professional Conduct. The Regional Director should be sensitive to the concern expressed by the Supreme Court and other federal appellate courts about the “tactical use of disqualification motions to har-

<sup>1</sup> Sec. 102.177(a) provides that “[a]ny attorney or other representative appearing or practicing before the Agency shall conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by those standards in interpreting and applying the provisions of this section.” Sec. 6 of the National Labor Relations Act authorizes the Board to make “such rules and regulations as may be necessary to carry out the provisions of this Act.” 29 U.S.C. §156.

<sup>2</sup> The ruling of a judge or Regional Director on a disqualification motion, of course, neither requires nor precludes the institution of separate disciplinary proceedings under Sec. 102.177. Disqualification and discipline (such as suspension or disbarment from future practice before the Board) are separate matters, separately determined.

ass opposing counsel,” which has led them to subject such motions to “particularly strict judicial scrutiny.” *Shurance v. Planning Control International, Inc.*, 839 F.2d 1347, 1349 (9th Cir. 1988), citing *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985).

The Board expresses no view on the merits of the Employer’s motion.

Dated, Washington, D.C. February 7, 2017

---

Philip A. Miscimarra,                      Acting Chairman

---

Mark Gaston Pearce,                      Member

---

Lauren McFerran,                      Member

(SEAL)                      NATIONAL LABOR RELATIONS BOARD